UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 40

Docket No. AT-0330-06-0198-B-2

Herbert W. Hayes,

Appellant,

v.

Department of the Army,

Agency.

March 19, 2009

Herbert W. Hayes, Madison, Alabama, pro se.

Walter A. Baker, Huntsville, Alabama, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of an initial decision dismissing his appeal under the Veterans Employment Opportunities Act of 1998 (VEOA), which was issued following our remand in *Hayes v. Department of the Army*, 109 M.S.P.R. 326 (2008). For the reasons set forth below, we DENY the petition for review, REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DENYING the appellant's request for corrective action under VEOA.

BACKGROUND

¶2 In 2004, the agency solicited applications for a Supervisory Operations Research Analyst, NH-1515-04. The agency issued an open competitive vacancy announcement under which "All U.S. Citizens" could apply, and a second vacancy announcement limited to status candidates (i.e., federal employees, former federal employees who were eligible for reinstatement, certain veterans, and others). I-1 Initial Appeal File (IAF), Tab 5, Subtabs 4i, 4k. The appellant, a preference eligible veteran, was considered under both announcements. *Id.*, Subtabs 4g at 2, 4h at 3. On February 3, 2005, the agency selected another individual for the position. *Id.*, Subtab 4g at 1.

¶3 The appellant has claimed that he discovered an "error in the hiring process" on April 8, 2005, and he initiated the grievance process under the governing collective bargaining agreement on April 21, 2005. I-1 IAF, Tab 5, Subtab 4f; Petition for Review File (PFRF), Tab 3 at 1. During the course of the grievance procedure, the appellant alleged in a July 27, 2005 letter to the local commander that the agency's selection process was flawed and violated his veterans' preference rights. I-1 IAF, Tab 5, Subtab 4b at 1, 6-7. After the agency concluded the grievance process, the appellant filed a November 28, 2005 complaint that was received by the Department of Labor (DOL) on December 1, 2005. I-1 IAF, Tab 1 at 7-8; PFRF, Tab 3 at 1. DOL dismissed the complaint, finding that the complaint had not been filed within the 60-day period required under VEOA. I-1 IAF, Tab 1 at 7.

¶4 The appellant then filed an appeal with the Board. I-1 IAF, Tab 1. The administrative judge (AJ) dismissed the appeal for lack of jurisdiction because the appellant had not exhausted his remedy before DOL, which had not issued a decision on the merits of his complaint. *Hayes v. Department of the Army*, 106 M.S.P.R. 132, ¶ 3 (2007). The Board denied the appellant's petition for review of that decision after considering the appellant's arguments under the then-applicable law. *Id.*, ¶ 4. The appellant thereafter filed a request for

reconsideration with the Board based on the Federal Circuit's decision in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir.) (en banc), *cert. denied*, 128 S. Ct. 375 (2007). *Id.*, ¶¶ 1, 5. In *Kirkendall,* 479 F.3d at 835-44, the court held that the Board has the authority to review, and should apply the doctrine of equitable tolling to, claims brought under VEOA that have been dismissed by DOL as untimely under 5 U.S.C. § 3330a(a)(2)(A). The Board reopened the appeal in *Hayes*, reversed the finding that the Board lacked jurisdiction to consider the timeliness of the appellant's VEOA claim, and remanded the case to the regional office for the provision of notice to the appellant on his burden and the issuance of a decision in accordance with the authority set forth in *Kirkendall. Hayes*, 106 M.S.P.R. 132, ¶ 8.

¶5 On remand, the appellant suggested that a DOL representative had misled him in a telephone conversation into believing that the 60-day deadline for filing a complaint would not begin to run until his grievance was resolved. Specifically, the appellant stated that

> [w]hen [he] contact[ed] the DOL(Vets) [Veterans' Employment & Training Service] by phone, the guidance was that the period for tolling to submit for DOL(Vets) adjudication began when the matter was not resolved at the lowest command level. The belief was at that time by the petitioner and the DOL(Vets) representative that there was no finding of complaint until the matter was decided or dismissed at the command level.
>
> When the complaint was submitted to DOL(Vets), another person decided that the period for DOL(Vets) tolling had started when the first notification of the error was discovered. This was contrary to what the petitioner was told telephonically.

B-2 Initial Appeal File (IAF), Tab 4 at 1. The appellant also stated that he believed that the time for filing a complaint with DOL did not begin at the time that he learned of his non-selection but began when "the matter was decided or dismissed at the command level," that his local union was unable to represent him, and that he was unsuccessful in finding a private attorney who had any familiarity with federal employment law. *Id.* at 1-2.

¶6 The AJ thereafter dismissed the appeal, finding that the appellant had failed to set forth circumstances establishing that the filing deadline should be equitably tolled. B-2 IAF, Tab 5, Initial Decision (ID) at 2-3. The AJ found that the appellant made no claim that he actively pursued his claim by filing a timely but defective pleading with DOL during the statutory period; nor did he make any claim that he was induced or tricked by his adversary, i.e., his employing agency, into allowing the deadline to pass. ID at 2. Further, the AJ determined that the appellant's claims of erroneous advice and inability to find representation are not the types of circumstances to which equitable tolling has been previously extended. ID at 2-3.

ANALYSIS

¶7 The appellant reiterates on review his claims that he was misled by DOL and that he believed that his complaint had to be processed "through supervisory channels before taken to outside agencies." PFRF, Tab 1. After fully considering the filings in this appeal, we find that the appellant has not presented new, previously unavailable, evidence or shown that the AJ made an error in law or regulation that affects the outcome. *See* 5 C.F.R. § 1201.115(d). We further discern no error in the AJ's ultimate determination that equitable tolling does not apply in this case. Therefore, we DENY the appellant's petition for review.

¶8 We nevertheless REOPEN this appeal on our own motion under 5 C.F.R. § 1201.118, and modify the initial decision to address the appellant's apparent claim that equitable tolling should apply in this case because he was induced or tricked by DOL into allowing the filing deadline to pass when it allegedly misinformed him regarding the filing deadline, and to clarify the basis for denying the appellant's request for corrective action.

The appellant filed an untimely DOL complaint and has not shown that the criteria for equitable tolling should be applied in this case.

¶9 Under 5 U.S.C. § 3330a(a)(1)(A), "[a] preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor." Such a complaint "must be filed within 60 days after the date of the alleged violation." 5 U.S.C. § 3330a(a)(2)(A). If the Secretary of Labor is unable to resolve such a complaint within 60 days after the date on which it is filed, the complainant may appeal the alleged violation to the Board. 5 U.S.C. § 3330a(d)(1). In order to establish jurisdiction over a VEOA appeal, an appellant must: (1) show that he exhausted his remedy with DOL; and (2) make nonfrivolous allegations that (i) he is a preference eligible within the meaning of VEOA; (ii) the action at issue took place on or after the October 30, 1998 enactment date of VEOA, and (iii) the agency violated his rights under a statute or regulation relating to veterans' preference. *Heckman v. Department of the Interior*, 109 M.S.P.R. 133, ¶ 6 (2008). "For the appellant to meet VEOA's requirement that he exhaust his remedy with DOL, he must establish that: (1) he filed a complaint with the Secretary of Labor; and (2) the Secretary of Labor was unable to resolve the complaint within 60 days or has issued a written notification that the Secretary's efforts have not resulted in resolution of the complaint." *Id.*; *see Coster v. Department of Agriculture*, 103 M.S.P.R. 191, ¶ 4 (2006); *Goldberg v. Department of Homeland Security*, 99 M.S.P.R. 660, ¶ 8 (2005).

¶10 The 60-day filing deadline set forth at 5 U.S.C. § 3330a(a)(2)(A), however, is subject to equitable tolling, and an employee's failure to file a complaint with DOL within that 60-day period does not summarily foreclose the Board from exercising jurisdiction to review the appeal. *Kirkendall*, 479 F.3d at 835-44. The Supreme Court explained in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990), that federal courts have typically extended equitable relief only sparingly, and that the Court had allowed equitable tolling in situations where the

complainant had actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant had been "induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."

¶11 The appellant did not file a defective complaint within the statutory period. The December 1, 2005 complaint to DOL was filed nearly 10 months after the date of the agency's action, and nearly 8 months after the expiration of the statutory 60-day time limit for filing set forth at 5 U.S.C. § 3330a(a)(2)(A). Moreover, even accepting as true the appellant's account of what he was told by the DOL representative by telephone, it does not establish that he was induced or tricked into allowing the filing deadline to pass. Although the appellant does not specify the date upon which this telephone conversation occurred, he states that

> [a]t no time during the grievance period was the appellant notified of alternate filing procedures nor a time limit to file with DOL(VETS), *nor was the appellant aware of the same until further research after the Third Step of the grievance was dismissed*. Upon contacting DOL(VETS), the time limit was then mentioned and discussed. Even then, the DOL(VETS) representative stated that the 60-day time limit would begin upon the final response and disposition by the Agency . . . .

B-1 IAF, Tab 3 at 3 (emphasis added). The third step of the appellant's grievance was dismissed on October 25, 2005, more than 6 months after the statutory deadline for filing a VEOA complaint with DOL had passed. I-1 IAF, Tab 5, Subtab 4a. Because the appellant's telephone conversation with the DOL representative occurred after the filing deadline had already passed, he could not have been induced or tricked into missing the deadline by any misinformation he received during that conversation. [1] Rather, the record indicates that the

[1] Because we find that the appellant could not have been tricked or induced by misinformation that he received after the deadline for filing with DOL had already passed, we do not rely on the AJ's determination that the appellant's assertions did not constitute a claim that he was induced or tricked by his "adversary," i.e., his employing agency. ID at 2.

appellant's failure to file a timely DOL complaint was a result of his own lack of due diligence in preserving his legal rights, which is not grounds for equitable tolling. *See Mitchell v. Department of Commerce*, 106 M.S.P.R. 648, ¶10 (2007), *aff'd*, 276 F. App'x 1007 (Fed. Cir. 2008).

¶12 In *Garcia v. Department of Agriculture*, 110 M.S.P.R. 371 (2009), the Board recently clarified the law surrounding the question of jurisdiction when a preference eligible has failed to timely file a DOL complaint and equitable tolling does not apply. Citing *Kirkendall*, 479 F.3d at 835 n.2, the Board determined that a failure to meet the 60-day time limit for filing a DOL complaint under 5 U.S.C. § 3330a(a)(2)(A) is not a failure to exhaust administrative remedies that deprives the Board of jurisdiction over a VEOA claim. *Id.*, ¶¶ 8-13. Instead, the Board held that when an appellant files an untimely complaint with DOL and equitable tolling does not apply, the request for corrective action must be denied based on a failure to meet the time limit for filing a complaint with DOL set forth at 5 U.S.C. § 3330a(a)(2)(A). *Id.*, ¶ 13.

¶13 Accordingly, because the appellant here filed an untimely DOL complaint, and equitable tolling does not apply, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, DENYING the appellant's request for corrective action under VEOA because he has failed to meet the time limit for filing a complaint with the Secretary of Labor set forth at 5 U.S.C. § 3330a(a)(2)(A).[2]

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[2] The Board's regulations allow for the disposition of a VEOA claim on the merits without a hearing. 5 C.F.R. § 1208.23(b). In fact, the Board has the authority to decide a VEOA appeal on the merits, without a hearing, when there is no genuine dispute of material fact and one party must prevail as a matter of law. *Haasz v. Department of Veterans Affairs*, 108 M.S.P.R. 349, ¶ 9 (2008). Here, we have decided this case without a hearing because there is no genuine dispute of material fact and the agency must prevail as a matter of law.

ORDER

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at

our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.